Filed 11/17/09 P. v. Ramirez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. ALBERTO AVENA RAMIREZ, Defendant and Respondent.	E047420 (Super.Ct.No. FVA027496) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Michael A. Knish, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Michael A. Ramos, District Attorney, and Grover D. Merritt and Grace B. Parsons, Deputy District Attorneys, for Plaintiff and Appellant.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal the grant of defendant Alberto Avena Ramirez's petition for writ of habeas corpus pursuant to Penal Code section 1506. They contend that the trial court erred by finding that counsel was ineffective and that such ineffectiveness was

prejudicial and, as a consequence, erred in granting the petition for writ of habeas corpus. We disagree and affirm the trial court's grant of the petition for writ of habeas corpus.

I

PROCEDURAL BACKGROUND

Defendant was found guilty of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 187, subd. (a), 664)[1] and assault with a firearm (§ 245, subd. (a)(2)). The allegations that defendant personally used a firearm within the meaning of sections 12022.53, subdivision (b) and 12022.53, subdivision (c) for the attempted murder and for the assault with a deadly weapon pursuant to section 12022.5, subdivision (a) were found true. Prior to sentencing, the trial court struck the jury finding that the attempted murder was premeditated and deliberate. Defendant was sentence to 7 years on the attempted murder, plus 20 years for the personal and intentional weapons use under section 12022.53, subdivision (c), for a total of 27 years. The remaining sentences were imposed and stayed.

Defendant appealed his conviction. In addition, he filed a petition for writ of habeas corpus (case No. E045325) claiming that he was denied his right to testify and that his counsel was ineffective for failing to advise him of his right to testify. By order filed March 20, 2008, this court ordered the petition to be considered with the appeal for the sole purpose of determining whether an order to show cause should issue.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

As for the direct appeal, this court rejected defendant's claims that the evidence was insufficient to support his conviction for attempted murder and that the trial court should have stricken the weapons use enhancement found true under section 12022.53, subdivision (b) rather than imposing and staying the enhancement; we agreed that the abstract of judgment should be amended. (*People v. Ramirez* (Oct. 7, 2008, E043539 [nonpub. opn.] (*Ramirez I*).)[2]

This court then addressed the petition for writ of habeas corpus. We reviewed the evidence presented with the petition that included a declaration from defendant wherein he claimed he did not know he had the right to testify or that he had the right to decide if he wanted to testify. Defendant also claimed that, had he known he had the right to testify, he would have testified that although he was present at the nightclub and shot the gun, he did not fire the gun *at* the victim. Further, we noted that Scott's declaration had been offered wherein he stated he never told defendant that he had a right to testify or that the decision whether to testify was defendant's own. Scott had told defendant he did not think he would be a good witness at trial. Scott did not tell defendant he could not testify. We concluded, "Defendant has stated a prima facie case of deficient performance by his trial counsel under [*Florida v.*] *Nixon* [(2004) 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (*Nixon*)]." (*Ramirez I, supra*.) Specifically, we held, "If factually accurate, these assertions at least potentially constitute deficient performance of trial counsel . . . ." (*Ibid.*)

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[2] We have taken judicial notice of our files in those cases, case Nos. E043539 and E045325.

We also stated that defendant had shown a prima facie case of prejudice. "The only percipient witness against defendant was Aguilar. If defendant had taken the stand and testified, as stated in his declaration, that he did not fire a gun at Aguilar, he did not point a gun at Aguilar, and he did not assault Aguilar or anyone else, the jury would have been presented with a simple credibility issue. The verdict would depend on the jury's resolution of the credibility issue, and we find that defendant has at least shown a reasonable probability that the outcome of the trial might have been different. Defendant has therefore made a prima facie showing of ineffective assistance of counsel." (*Ramirez I, supra*.)

By separate order, we directed the parties to appear and show cause in the San Bernardino Superior Court. We allowed the People to file a formal return to the petition for writ of habeas corpus. In addition, we advised that at the hearing, the trial court should determine four questions: "[i]f petitioner was aware of his right to testify, if counsel informed petitioner he had the right to testify, if counsel informed petitioner he could not testify and if counsel obtained petitioner's agreement to waive his right to testify."

We also ordered that, should the trial court conclude that counsel's performance was in fact deficient, it "should determine whether petitioner was prejudiced by counsel's deficient performance, i.e., but for counsel's errors the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674 (*Strickland*)].) If the superior court finds that petitioner was not

prejudiced, the writ petition should be denied. If the superior court finds that petitioner was prejudiced, the writ petition should be granted."

The People filed a return to the petition for writ of habeas corpus. Defendant filed a traverse. After conducting the evidentiary hearing and finding that defendant was not aware of his right to testify and that such failure to testify was prejudicial, the trial court granted defendant's petition for writ of habeas corpus and set the matter for pretrial on January 6, 2009.

The People filed an appeal pursuant to section 1506 on January 2, 2009. They requested that the trial court issue a stay of its order pending appeal in this court, which the trial court denied. On February 6, 2009, the People filed a petition for writ of supersedeas asking this court to stay the proceedings pending appeal. By order dated March 25, 2009, we granted the stay pending further order of this court.

II

FACTUAL BACKGROUND FOR UNDERLYING TRIAL[3]

On August 5, 2006, Jose Aguilar was working as a security guard (checking identification at the door and curtailing any bar fights) at a nightclub in Bloomington. Aguilar had seen defendant in the club three or four times prior to that day. Defendant arrived that night with a male friend. Defendant and his friend were being disruptive, so Aguilar ordered them all to leave, and they complied.

Aguilar stood near the nightclub door and watched defendant and his friend walk to their car, which was parked approximately 40 feet from the nightclub door. Aguilar

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[3] We draw the statement of facts from *Ramirez I*.

saw defendant take a chrome pistol from under the passenger seat. Defendant cocked the gun and shot it toward where Aguilar was standing. Defendant was looking at Aguilar's location at the time he shot the gun.

Aguilar tried to take cover behind a wall and began backing up toward the entrance to the nightclub. Defendant got into his car, and the car began pulling away. Aguilar heard four more shots. After the third shot, Aguilar signaled for defendant to calm down. Aguilar then heard the fourth shot, and a nearby window broke. Defendant was not looking directly at Aguilar when he shot the fourth time. A fifth shot was fired into the air as the car was leaving. Five shell casings were found the parking lot.

Defendant returned to the nightclub the following night and apologized for the shooting. Defendant's friend came separately to the nightclub the night after the shooting and asked for some change he had left at the bar. Defendant returned to the nightclub two nights after the shooting to get change he left at the bar the night of the shooting. Aguilar asked defendant if he had a gun on him. When defendant told Aguilar he did, Aguilar instructed defendant to put it in his car and he would let him into the nightclub. Defendant was arrested that night.

Herman Rojas was the manager of the nightclub at the time of the incident. He saw defendant in the nightclub before the shooting but did not see the argument. He heard the shots fired, but he did not recall giving a description of defendant to the police. He recalled that defendant came back to the nightclub twice after the shooting.

Eber Velasquez, Rojas's sister, was helping manage the nightclub at the time of the shooting. She heard the shots and went outside. Defendant came back to the bar after the shooting at least three times.

III

EVIDENTIARY HEARING AND TRIAL COURT RULING

A. *Evidentiary Hearing Evidence*

Defendant testified that he had completed the 10th grade and knew how to read and write English. He was represented at his trial by Frank Scott. He first met with Scott privately at the jail in the middle of his trial (November 16, 2006; trial began November 2). Defendant had spoken with Scott sometime prior to his trial, and Scott told him his strategy was going to be that the People did not have enough evidence to convict defendant and that defendant had not been present at the nightclub that evening. No one from the public defender's office went to the jail prior to his trial. Defendant claimed he had no discussions with Scott regarding the case strategy during numerous in-court proceedings occurring prior to trial.

When Scott went to visit defendant at the jail, he stayed for three minutes, until he got angry because defendant questioned him as to why he had not subpoenaed any witnesses.[4] Defendant claimed he gave Scott a list of witnesses to subpoena. Defendant testified that Scott told him, "'I don't [have anything] for you . . . . '" Defendant then told Scott that he was going to testify. According to defendant, Scott responded, "No. No. You wouldn't make a good witness. . . . I [have] been a lawyer for 30 some

[4] Defendant waived his attorney/client privilege.

years . . . .'" Scott then left. Scott told defendant that he would be impeached by his prior convictions but did not explain what that meant, only telling him that he would not make a good witness because of the convictions.[5] Defendant still wanted to testify because his prior convictions were not violent.

Scott was angry and never told defendant, at that time or during trial, that he had an absolute right to testify. There was no further conversation for the remainder of the trial about defendant testifying. At some point after the jurors began their deliberations, defendant asked Scott when it would be his turn to testify, and Scott told him it was too late. Defendant did not find out about his right to testify until he met his appellate attorney.

Defendant did later admit that he spoke with Scott at the preliminary hearing on August 24, 2006. Defendant told Scott he wanted all of the people who were present at the bar that day to testify on his behalf, including a female worker and a disc jockey working that day. Defendant did not know their names but felt Scott could easily find them by going to the bar. Defendant did not explain to Scott what happened the night of the shooting. Scott gave him a packet of information regarding the evidence against him, including the police report, but never asked defendant about it. Defendant remembered the prosecutor stating in open court prior to trial that he would use defendant's prior convictions against him if he testified.

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[5] The People provided evidence that defendant had a juvenile conviction for burglary for breaking into a truck, a conviction for driving a stolen vehicle, and a conviction for possession of a controlled substance. These were as a result of guilty pleas by the defendant.

Defendant did not agree with how his case proceeded and maintained throughout the hearing that he wanted to testify because he did not agree with the strategy of calling no witnesses. Defendant was present when Scott advised the jurors that defendant did not have to testify and when he asked the jurors if it would affect their decision if defendant did not testify. Defendant did recall that Scott questioned some jurors regarding the impact that it would have on their decision if defendant did not testify and no defense witnesses were called. Defendant had no discussion with Scott after these comments. Defendant would have testified as stated in his declaration: He had shot the gun, but not at Aguilar.

Defendant had not previously been in a trial. He claimed that in his guilty pleas to prior charges, he never read the forms, and his attorneys never explained his rights to him. All defendant understood was that he was pleading guilty.

Defendant did not recall receiving a form at the arraignment in this case (although he signed it) wherein he waived his right to personal presence. The form included an advisement of the right to testify. Defendant did not recall at his arraignment that he was advised that he had the right to testify.

Defendant stated at the sentencing hearing that he never intended to hurt anyone and shot one time into the air. The person with him shot at the victim. Defendant also rejected that his statement at sentencing that " . . . I couldn't talk because I am scared of my family being hurt by someone else" meant he would not have testified. Rather, he was afraid to tell police the day he was arrested who was with him and who did the shooting.

Monica Yanez also testified at the hearing. She prepared the probation report to be used at the sentencing hearing. Defendant told her he was going to get a new trial because the "district attorney's office brought illegal witnesses during the trial that they never told my attorney about . . . ." She did not recall defendant telling her that he wanted to testify at trial and was upset with Scott.

Scott then testified. He had been a practicing attorney for 30 years, most of which was as a criminal defense attorney. A claim of ineffective assistance of counsel had never been sustained against him. His custom and practice when receiving a case was to review the police reports and then confer with his client.

Scott indicated that it was his custom and practice to discuss with clients their constitutional rights and their right to testify in their own defense. He had no specific recollection of having told defendant about his constitutional rights.

Scott claimed, relying on his log sheet for the case, that he spoke with defendant by phone on October 19, 2006, prior to trial, and that he had noted that defendant was at a friend's house and not at the bar that night. Further, defendant provided no witnesses.

Scott recalled they investigated possible witnesses, including defendant's wife. Defendant told Scott about "his relationship with a prior employee or girlfriend of the employee" that might be relevant to the incident, but Scott could not find her. These were the only witnesses proffered by defendant, and nothing came of them.

Scott never gave his clients a written advisement of constitutional rights. He met with defendant sometime in the middle of trial right after jury selection had been completed, but he did not recall the specifics of the conversation. He would have spoken

with defendant prior to this because there had been a plea offer. He did not recall the exact conversation about the plea, but his practice would have been to discuss what weighed in favor of the offer and risks of going to trial.

Scott recalled that his practice when there were no defense witnesses was to advise his client that it was not a good idea to testify because there would be no corroboration. He was "confident" he had this discussion with defendant. It was his understanding he did not have to specifically delineate each and every right to a defendant in a particular fashion. Scott did recall telling defendant that the prosecution had numerous witnesses, some of whom had no apparent motive to lie. It would be difficult to attack their credibility.

Although Scott could not specifically recall, he would have been aware of defendant's prior convictions, and it was his practice to advise a client that if he testified, the prior conviction would be used against him. It was his practice to advise a client that it was beneficial not to testify because then the priors could not be introduced. He would also advise his client that jurors do not like prior convictions. Although he had no specific recollection, if defendant had a felony conviction, he would not have missed advising defendant.

Scott did not have a specific recollection of advising defendant of the trial strategy prior to trial; however, Scott stated, "But it seems sort of patent to me that when you see the note that says he had no witnesses and I see the results of the investigation which there are no witnesses, then . . . I would report that to him and say, you know, you're not going to be able to overcome that with your testimony." He told defendant he would not

make a good witness at trial. Scott believed that defendant would not be very convincing, especially in light of the fact that there were no corroborating witnesses and because of his prior convictions. He believed that defendant agreed with his assessment and strategy.

Defendant told Scott he wanted to testify after the jury had gone into deliberations. This came as a "surprise" to Scott. Scott never told defendant prior to trial that he could not testify. Although Scott stated in his declaration that he did not ever specifically discuss with defendant whether he was going to testify and that he did not ask him if he wanted to testify, it was his custom and practice to address this with his clients.

Scott wished to retract his statements from the declaration "to an extent." He stated, "I don't have a specific recollection of having that conversation. But as I've indicated, paying sort of close attention to what my behavior is, my usual procedure, I don't think it's accurate." He indicated it was his practice to always tell the client it was still his or her decision whether to testify. His declaration would better be read to be that he did not have a specific recollection of defendant's case, but it was his custom and practice to advise a client of the right to testify.

In addition to the oral testimony, the trial court unsealed the *Marsden*[6] transcript from the trial. At the *Marsden* hearing conducted on November 2, 2006, the first day of trial, Scott advised the trial court that he was bringing the motion on defendant's behalf. Scott informed the trial court that he felt that there was no "really really credible defense" and that he thought the chances of winning were "virtually" nonexistent. Scott had

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6 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

recommended that defendant take the plea bargain, but defendant had rejected it. Defendant advised the trial court that he did not want to plead guilty because he "didn't do it." The trial court indicated that it had reviewed the response, the informal reply, the return, and the traverse.

The People offered several exhibits. Relevant here, exhibits 2, 4, 6, and 7, were proofs of waivers of personal presence at arraignment prior to the trial in this case, and prior to cases in 2001 and 2002, on which the form stated that defendants have a right to testify. Exhibit 5 was a guilty plea form for defendant's conviction for violating Vehicle Code section 10851, subdivision (a), signed on February 14, 2002, which included a statement that he could have a trial and testify for himself. Exhibit 8 was the probation report filed in this case in which defendant told the probation officer that his friend gave him a gun that night and he shot at the security guard, but up in the air. He also made the statement that his conviction would be reversed because of illegal witnesses brought by the prosecution.

B. *Trial Court Ruling*

The trial court first noted that in its experience with Scott, he was a "very good lawyer." The trial court found both defendant and Scott to be believable. The trial court felt that there was evidence lacking as to what really happened during the jail meeting.

The trial court found that as to ineffective assistance, *Nixon* was applicable in a "limited way." It then addressed the four questions required by this court to be answered. First, defendant was not aware of his right to testify. His signing forms in prior cases was not enough to inform him of this right. The trial court noted that in the Fontana

arraignment court not-guilty pleas were entered automatically during video arraignments, and the judge did not go over the specific rights in open court. Moreover, defendant could not be expected to remember his rights from a prior plea, and he had never had a jury trial.

Second, Scott did not inform defendant of his right to testify. The trial court found, "[Scott] admitted that in his declaration that he did not tell him and I don't think he did based on the testimony I heard." Certainly, since Scott did not discuss defendant's right to testify with him, he did not obtain a waiver of his right to testify from defendant. The trial court did not believe, however, that Scott informed defendant he could *not* testify.

The trial court believed that from the beginning Scott did not intend to call defendant and that his strategy was to just "pick at" the People's case. It stated, "[T]he thing that bothers me a lot about this in this particular case . . . [is that] I sat through the trial, I was there and this was a specific intent crime, this was an attempted murder. And Mr. Scott testified that he didn't know — well, that [defendant] wasn't helping much and certainly that's borne out by the fact and that is hearsay, but it came out in the hearing, that . . . the public defender's file indicate[s] that [defendant] wasn't there, he was at his brother's house and then later he testified he might have fired one shot, there were different stories, but I think at that point there was a duty for the defense attorney not to say what happened, because oftentimes we don't want to know, but to at least tell [defendant] this is a specific intent crime, they have to show you intended to kill that man. And if you were there, maybe if you testified you could talk about that that's not

the case, that you didn't intend to kill, and there was never any indication of Mr. Scott's strategy about that, about intent. . . . [Defendant]'s testimony about what he did intend, it was really important to have a conversation about that, I think. And that's what makes it different . . . ."

The trial court then criticized Scott for concluding that evidence of intent needed to be corroborated. It concluded, "The fact that Mr. Scott didn't [have defendant testify], I'm not arguing is ineffective assistance. Obviously the Court of Appeal[] did not find on the record that that's ineffective, but it's ineffective to not discuss prior to the trial that these are the elements that have to be proved and you have a right to testify. My strategy is not to put you up there because I don't think you'd make a good witness and you have these priors, but, you know, if you were there and you fired the gun, maybe your testimony about the intent is something that could help and that did not happen in this case, and I feel that based on the answers to the questions posed by the Appellate Court and the *Florida v. Nixon* case which argues that the lawyer does have the duty to discuss the important decisions, like basic strategy and whether or not to testify, I do find there was ineffective assistance of counsel in this case."

The trial court then noted, "Now then we get to the issue of prejudice, which is a harder call, certainly a tough issue." It concluded that if defendant had testified, it likely would have made a difference to the jury, especially on premeditation and the issue of intent. It felt that there was a "substantial probability that there would have been a different result."

The trial court granted defendant's petition for writ of habeas corpus and set the matter for retrial. It also ordered that the determination of the trial court be reported to the California State Bar.

IV

INEFFECTIVE ASSISTANCE OF COUNSEL

The People contend that the trial court erred by concluding that defendant had made an adequate showing that he received ineffective assistance of trial counsel. Further, the trial court erred by finding that such ineffective assistance was prejudicial.

A. *Standard of Review*

"'A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]' [Citation.]" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; see also *In re Cox* (2003) 30 Cal.4th 974, 997-998.)

After an evidentiary hearing on a petition for writ of habeas corpus proceeding, "this court independently reviews a referee's resolution of legal issues and mixed questions of law and fact. [Citation.]" (*In re Cudjo, supra*, 20 Cal.4th at pp. 687-688; see also *In re Johnson* (1998) 18 Cal.4th 447, 461.) "'[W]e give great weight to those of the referee's findings that are supported by substantial evidence. [Citations.] This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations [citation]; consequently, we give special deference to the referee on

factual questions "requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying" [citation].' [Citation.]" (*In re Lawley* (2008) 42 Cal.4th 1231, 1241.)

B. *Analysis*

1. *Reasonableness of counsel's representation*

We first address whether Scott's representation fell below a standard of reasonable competence. The People claim that defendant failed to present credible evidence in support of his claims that he did not know he had a right to testify, Scott never informed him he had a right to testify, Scott told him he could not testify at trial, and Scott never obtained his agreement to waive his right to testify.

To prevail on a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance fell below a standard of reasonable competence. (*Strickland*, *supra*, 466 U.S. at pp. 687-688; *People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Strickland,* at p. 690.)

In *Nixon*, defendant's trial counsel, after realizing the overwhelming evidence of defendant's guilt in a capital trial, determined the best strategy was to concede guilt during trial on the charges and plead to the jury to spare his life during the penalty phase. (*Nixon, supra,* 543 U.S. at pp. 180-181.} Defendant never expressly consented to this strategy. (*Id.* at p. 181.) The Florida Supreme Court concluded that this was equivalent to a guilty plea; since defendant did not expressly affirm the guilty plea, ineffective assistance of counsel was presumed and it reversed the conviction. (*Id.* at pp. 185-186.)

The Supreme Court granted review. It first set forth the general requirements for effective assistance. "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy. [Citation.] That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.' [Citation.] But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' [Citations.] Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." (*Nixon, supra,* 543 U.S. at p. 187.) It reversed the decision of the Florida Supreme Court, finding that counsel had provided effective assistance as he had sound

trial strategy and defendant was unresponsive to counsel's requests for consent. (*Id*. at p. 192.)

Further, our own Supreme Court has stated that "[a]lthough tactical decisions at trial are generally counsel's responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel. [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1198.)

What these cases make clear is that it is defendant's decision to testify at his own trial, after consultation with his counsel. Counsel is required to inform defendant that it is his decision to make. Here, defendant testified consistent with his declaration that Scott never told him he had an absolute right to testify and that such decision was his to make. Scott could not recall whether he had specifically advised defendant of his right to testify; however, it was his custom and practice to advise all clients of their right to testify. The decision of Scott not to inform defendant that he had an absolute right to testify was not a tactical decision. Scott had an affirmative duty under *Nixon* and *Carter* to ensure that defendant was aware, regardless of the trial strategy, that it was his decision whether or not to testify. We accept the trial court's findings, based on its assessment of the credibility of the witnesses, that defendant was not aware of his right to testify, that Scott failed to inform him of such, and that Scott certainly never obtained a waiver of that right from defendant.

The People point to the fact that Scott retracted his declaration. This is not an accurate representation of what occurred at the evidentiary hearing. Scott had no independent recollection of having advised defendant of his right to testify. Rather, Scott

indicated that, after further contemplation following signing the declaration, he noted that his custom and practice was to advise all of his clients of their right to testify and that it was the client's decision. Additionally, it was his custom and practice to discuss with defendants when there were no witnesses that it was not a good idea to testify, and he was "confident" he had had this discussion with defendant.

Scott still provided no testimony that he complied with his duties under *Nixon* in advising defendant. Scott admitted he never thought defendant would make a good witness and so advised defendant. What is lacking from the evidence is that Scott actually advised defendant here, regardless of his opinion of the case, that it was defendant's ultimate decision whether to testify. With no evidence to the contrary, we must accept defendant's credible testimony that he was never told he could testify regardless of Scott's decision that he would not make a good witness.

The People also rely on evidence presented below -- the prior convictions of defendant, that he had signed a waiver of personal presence at arraignment form that included that he had the right to testify, and the voir dire transcript from the instant trial wherein it was stated by Scott that defendant would likely not testify or present witnesses -- to show that defendant actually knew he had the right to testify. However, according to *Nixon*, it is trial counsel's duty to inform the defendant in each case of the defense strategy and of the right to testify and to obtain the defendant's consent. (*Nixon, supra*, 543 U.S. at p. 187.) It does not appear that the fact a defendant may already know of the right to testify absolves counsel of this duty. Moreover, defendant clearly stated that he did not consent to the trial strategy.

The trial court accepted defendant's testimony at the evidentiary hearing that he in fact was not aware of his right to testify at the time he entered the prior guilty pleas and never read the plea forms. He also stated he had never read the forms when he waived his right to be personally present for arraignments. As stated by the trial court, there is no reason defendant should recall such right from cases occurring in the past or that he would have known of the right during prior arraignments. We accept the trial court's determination that defendant did not know about his right to testify prior to the instant case.

As previously stated, we give special deference to the referee on factual questions that involve witness credibility. (*Lawley, supra,* 42 Cal.4th at p. 1241.) Here, the trial court had the opportunity to observe defendant and determine whether his testimony was credible. Scott, although credible, provided little to contest defendant's credible claim that Scott never advised him that it was his ultimate decision whether or not to testify. Although it certainly was a proper tactical decision on Scott's part to advise defendant not to testify, he had to let defendant make that decision for himself. We therefore accept the trial court's determination that such failure to so advise defendant constituted deficient representation.

2. *Prejudice*

We now turn to whether the failure to advise defendant of his right to testify was prejudicial, the second prong of *Strickland*. "[P]rejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) "A defendant must prove prejudice that is a '"demonstrable reality," not simply speculation.' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

At the evidentiary hearing, defendant stated that he would have testified at trial consistent with his declaration. He would have testified that he did not point the gun or fire at Aguilar or at anyone else and that he did not intend to kill Aguilar.

As we stated in our previous opinion, had defendant taken the stand and testified he did not shoot at Aguilar, it would have been a credibility issue for the jury. We stated that "defendant has at least shown a reasonable probability that the outcome of the trial might have been different." (*Ramirez I*, *supra*.) The trial court resolved the issue, finding that if defendant testified it likely would have made a difference to the jury, especially on premeditation and the issue of intent. We agree with that finding.

The People claim defendant has failed to show prejudice because the evidence shows defendant never intended at the time of trial to testify that he shot the gun but did not intend to hit Aguilar. Rather, at the time of trial, defendant maintained that he was not present at the nightclub that evening. They rely on evidence that, at the *Marsden* hearing, defendant refused to plead guilty because he claimed he did not commit the crimes. Further, they refer to Scott's notes from a telephonic meeting on October 19, 2006, that stated, "Defendant has no witnesses. Says he was at — and I put in quotes —

friend's, end quote, house. Not at the bar. — meaning where this occurred — 'on the night of arrest. Has no names. Says drug addicts and couldn't be located or wouldn't be willing to testify." Moreover, he made statements to the probation officer that he would get a reversal because of illegal witnesses, not because he had been excluded from testifying.

It is somewhat troubling that Scott had notes taken prior to trial that stated defendant claimed he was not at the nightclub that evening. If defendant intended at the time of trial to testify that he was not present that evening, such testimony would have had little effect on the verdict based on the overwhelming evidence that he was at the nightclub. However, it is unclear from Scott's testimony if defendant in fact made these statements or whether it was Scott's own determination of what the defense should be. Further, the *Marsden* transcript sheds no further light on what defendant would have testified to at trial, as he merely denied he committed the charged crimes. In light of other strong, direct evidence as to defendant's purported testimony, we do not believe that this undermines defendant's claim of prejudice based on what his testimony at trial would have been.

Defendant testified at the evidentiary hearing that he never told Scott what happened that night when they met at the time of the preliminary hearing. Defendant also testified that he disagreed with Scott's strategy and that Scott first met with defendant in the middle of trial. By the time that defendant was able to meet with Scott, the defense strategy had already been decided on by Scott. We must resolve prejudice by finding what would have occurred at trial had defendant been aware of his right to testify on his

own behalf. There is credible evidence that defendant would have testified consistent with his declaration and evidentiary hearing testimony.

We also note that defendant told the probation officer just prior to sentencing that he had been the shooter but had received the gun from his friend and had shot up in the air. He stated at sentencing that he had shot the gun but only up in the air. He repeated this in his declaration and testified as such at the evidentiary hearing. The trial court found him credible. This undermines the import of notes in Scott's file made months before trial.

The People fault defendant for not presenting any tangible evidence of prejudice. However, we are not sure what evidence defendant could have presented to support his prejudice claim. Defendant's only proffered evidence was his own testimony as to his intent at the time of the shooting. No other evidence would likely be available to support the claim.

We agree with the trial court that there was a reasonable probability that the result of the trial would have been different had defendant been aware of his right to testify. Such testimony would have placed the decision in the jury's hands as to who was more credible. Although defendant would have likely been impeached with his prior convictions, we cannot conclude that the jury would have completely disregarded his testimony. It is telling that the trial court conducting the evidentiary hearing found defendant credible. We agree with the trial court that the petition for writ of habeas corpus should be granted.

V

DISPOSITION

We affirm the trial court's grant of the petition for writ of habeas corpus. We hereby order the stay of the proceedings in this case lifted upon finality of this opinion. "Pursuant to Business and Professions Code section 6086.7, we are required to report our reversal of the judgment on the ground of ineffectiveness of counsel to the State Bar of California for investigation of the appropriateness of initiating disciplinary action" against Attorney Frank Scott. (*In re Jones* (1996) 13 Cal.4th 552, 589, fn. 9.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

KING
J.

MILLER
J.